No. 43034-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

TANNER Z. RUSSELL,

Respondent.

Appeal from the Superior Court of Washington for Lewis County
Case No. 11-1-00627-6

Appellant's Reply Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ARGUMENT

A. OFFICER MAKIEN'S FRISK OF RUSSELL WAS OBECTIVELY REASONABLE.

The State rests portions of its reply on the arguments set forth in its Opening Brief. The State is taking this opportunity to reply to portions of Russell's brief as well as clarify the State's assignment of errors.

1. The State Did Provide Argument For Its Assignment of Errors.

Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). In this case the State assigned error to the following Findings of Fact: 1.16, 1.18, 1.23, 1.24, 1.25, 1.27, 1.30 and 1.32. While the State did not specifically reference the findings in its argument portion, the State did argue the facts that it believed showed the previously mentioned findings were in error. The State's issues with findings of fact, 1.18, 1.23, 1.24, and 1.30 is that they were missing pertinent facts testified to during the hearing. Findings of Fact 1.18 and 1.23 are both missing the fact that during the contact with Russell there were no other civilians present in the

area. *See* RP 9, 17, 46; CP 73-74.[1] Finding of Fact 1.24 is missing the statement that while Officer Makein knew the box itself was not a weapon he believed the box could contain a pistol or weapon similar to the one Russell had in his possession on August 28, 2011. RP 18; CP 74.[2] Finding of Fact 1.30 is missing the word probably. RP 35, CP 75. Officer Makein testified that the syringe probably weighed a fraction of what the pistol weighed. RP 35.

Finding of Fact 1.25 is not supported by substantial evidence. RP 38-39, 45; CP 74. Officer Makein clarified his testimony that the officer safety concern was not alleviated by simply removing the case from Russell's pocket because he did not know if the case could contain a weapon, such as the one Russell had possessed eight days earlier. RP 18, 45.[3] Finding of Fact 1.16 is not supported by substantial evidence as Officer Makein testified he did not ask Russell whether Russell had retrieved his firearm that had been confiscated during the August 28, 2011 encounter. RP 16, 41; CP 73. There is no testimony in the record to support Finding of Fact 1.32. *See* RP.

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[1] This can be found in the argument section of State's Opening Brief, Argument A, section 3, page 13.

[2] This can be found in the argument section of State's Opening Brief, Argument A, section 3, page 15 and Argument B, page 18.

[3] This can be found in the argument section of State's Opening Brief, Argument B, page 18.

In regards to Finding of Fact 1.27, the State concedes that it erroneously assigned error to it as it is consistent with the testimony given during the suppression hearing.

2. Officer Makein's Extension Of The Traffic Stop To Perform A Protective Frisk For Weapons Was Reasonable Given All The Facts And Circumstances.

The State rests on its argument set forth in its Opening Brief.

3. The Information Obtained By Officer Makein From The August 28, 2011 Encounter With Russell Was Lawfully Obtained.

The State proved that there was a legitimate officer safety concern which justified the search of Russell on September 5, 2011. Russell now claims that the State did not meet its burden to show that the information Officer Makein based his concern for officer safety on was lawfully obtained on August 28, 2011. Brief of Respondent 8-9.

The State first asserts that it is not necessary to determine if the information Officer Makein was basing his officer safety concern upon was obtained through a lawful search. The concern is officer safety, an officer does not need to disregard information he or she has obtained if the officer cannot articulate a lawful basis for knowing the information or does not know how the information was obtained. *See, State v. Holbrook,* 33 Wn. App. 692, 695, 657 P.2d

797 (1983). In *Holbrook* the court found the following persuasive when determining a standard for the reliability of the information an officer relies upon when evaluating safety:

> When the investigatory stop itself is based on information supplied by another person, rather than on the officer's personal observation, the information must carry some indicia of reliability to justify the initial stop. *However, when an officer has made a reasonable investigatory stop and realizes that he has information that the individual carries a gun, the officer has a right to neutralize the threat of physical harm to himself and others during the investigative stop by patting the individual down for weapons—regardless of whether his information that the individual carries a gun has been verified or came from a "reliable" informant.*

State v. Holbrook, 33 Wn. App. at 695 (italics original).

In this case Officer Makein made a legitimate stop on Russell for a traffic infraction. Officer Makein is allowed to use the information he had, from personal knowledge, that a week earlier Russell had a loaded firearm in his possession.

While the State is not agreeing with Russell that the State must prove Officer Makein's knowledge of the gun was obtained by a lawful search, arguendo, the search on August 28, 2011 was lawful and any information obtained from it could be used by the officer.

The general rule is that warrantless searches are considered per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2026, 29 L.Ed.2d 564 (1971). It is the State's burden to show that a warrantless search falls within an exception to this rule. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), *citing Arkansas v. Sanders*, 448 U.S. 753, 759, 99 S.Ct. 2586, 2590, 61 L.Ed.2d 235 (1979). One exception to this warrant requirement is a person's lawful custodial arrest. *State v. Craig*, 115 Wn. App. 191, 194-95, 61 P.3d 340 (2002).

Making or possessing burglary tools is a gross misdemeanor offense. RCW 9A.53.020. A misdemeanor or gross misdemeanor offense may be charged by an issuance of a citation from the arresting officer or any other peace officer. RCW 10.37.015(1); CrRLJ 2.1(b)(1). A person may be under custodial arrest and still issued a criminal citation for the crime they are arrested for if that crime is a misdemeanor or gross misdemeanor. CrRLJ 2.1(b)(1).

Russell argues that because Finding of Fact 1.14 stated that the August 28, 2011 incident resulted in the issuance of a misdemeanor that the State did not prove that the evidence obtained from search of Russell's person was lawful. Brief of Respondent 9. There was a discussion that Russell and the driver

of the car were casing other cars and had burglary tools in the vehicle when it was stopped on August 28, 2011. RP 13, 22-23. The testimony during the CrR 3.6 hearing went as follows:

> Q. And just so we know what's going on here, just - - my understanding is that on that day it looked like the arrest was for some misdemeanors; is that right.
>
> A [by Officer Makein]. The female, yes.
>
> Q. And Mr. Russell.
>
> A. Mr. Russell, I didn't do that part of the investigation. I believe it was a misdemeanor.

RP 22. While Officer Makein's knowledge of the exact crime Russell was arrested for is obviously vague, he testified that Russell was arrested, for what he believed was a misdemeanor offense. RP 22. This is the only reference to the arrest of Russell on August 28, 2011 in the report of proceedings. *See* RP.

The State satisfactorily proved the information Officer Makein based his officer safety concern upon was lawfully obtained. Russell's argument to the contrary is without merit.

B. OFFICER MAKEIN'S REMOVAL AND OPENING OF THE CASE WAS OBJECTIVELY REASONABLE AND JUSTIFIED TO ELIMINATE THE RISK TO THE OFFICER UNDER THE CIRCUMSTANCES OF THIS CASE.

The State rests on its argument set forth in its Opening Brief.

C. THE TRIAL COURT PROPERLY FOUND THAT OFFICER MAKEIN RECEIVED CONSENT FROM RUSSELL TO REMOVE THE CASE FROM RUSSELL'S POCKET AND OPEN THE CASE.

Russell did not file a cross-appeal on this case. *See* CP. If Russell wished to cross-appeal a finding in this case he would have had to file the appropriate notice. RAP 5.1(d). The rules of appellate procedure limit the ability of a respondent to pray for affirmative relief:

> The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary, or (2) if demanded by the necessities of the case.

RAP 2.4(a). A party who fails to cross-appeal an issue is generally precluded from raising it on appeal. *Amalgamated Transit Union Local 587 v. State,* 142 Wn.2d 183, 202, 11 P.3d 762 (2000) *opinion corrected*, 27 P.3d 608 (2001) (citations omitted). A party who prevailed does not need to cross-appeal a ruling, such as a finding of fact, if the party does not seek further affirmative relief. *State v. Kindsvogel*, 149 Wn.2d 477, 481, 69 P.3d 870 (2003). The prevailing party is allowed to argue to this Court any ground to

support the trial court's order which can be found in and supported by the record. *Id.*

Russell's argument in regards to the voluntariness of his consent not only is an argument in support of the trial court's findings, i.e., that the evidence should be suppressed due to an unlawful search, but also a request for further relief. In regards to his argument that Russell did not give consent, the State rests its argument as set forth in its Opening Brief. On the other hand, Russell's argument that this Court must vacate Finding of Fact 1.26 is a request for further relief and not properly before this Court. This court should deny Russell's request to vacate Finding of Fact 1.26.

D. EVIDENCE THAT IS LAWFULLY OBTAINED MAY BE USED IN A CRIMINAL PROSECUTION AGAINST A DEFENDANT.

The State rests on its argument set forth in its Opening Brief.

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II. CONCLUSION

For the reasons argued in the State's Opening Brief and this Reply Brief this court should reverse the trial court's ruling suppressing the evidence and remand the case back to the trial court for further proceedings.

RESPECTFULLY submitted this 2nd day of July, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

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